

*In the Matter of Police Sergeant (PM2547C and PM2505G),  
City of Atlantic City*  
DOP Docket Nos. 2006-2933, 2006-3705, and 2006-3770  
**(Merit System Board, decided July 19, 2006)**

Edward Pollock, Jerry Barnhart, Joseph Falcone, Gregory Stites, Lee Hendricks, and Harold Cooper (the petitioners), Police Officers with the City of Atlantic City, represented by Mary Beth Clark, Esq., appeal the attached determination of the Division of Selection Services, which denied the appointing authority's request to certify the Police Sergeant (PM2547C), City of Atlantic City, eligible list. Angelo Maimone and Vincent DeMaria, Police Officers with the City of Atlantic City, object to the certification of the Police Sergeant (PM2547C) eligible list and appeal the cancellation of the February 14, 2006 certification of the Police Sergeant (PM2505G), City of Atlantic City, eligible list. Since these matters address similar issues, they have been consolidated.

The Police Sergeant (PM2547C) eligible list was promulgated on March 7, 2002, containing the names of 154 eligibles, and it was originally scheduled to expire on March 6, 2005. The list was subsequently extended "for one year . . . or until a new list becomes available, whichever occurs first." *See In the Matter of Promotional Lists for Public Safety Titles* (MSB, decided April 7, 2004). Only one certification, dated August 15, 2003, of the Police Sergeant (PM2547C) eligible list was issued. The appointing authority appointed the first ranked eligible, effective January 16, 2004, and bypassed Pollock, who ranked second on the certification.<sup>1</sup> It also appointed the eligibles ranked third through sixth, effective February 17, 2004. Barnhart, Falcone, Stites, Hendricks, and Cooper, who ranked seventh through eleventh on the certification, were not appointed. A new list (PM2505G) issued on January 4, 2006 and promulgated on January 12, 2006 with an expiration date of January 11, 2009. The petitioners appear on this list (PM2505G) and are ranked as follows: Stites ranks third; Barnhart ranks ninth; Cooper ranks 18<sup>th</sup>; Falcone ranks 21<sup>st</sup>; Hendricks ranks 28<sup>th</sup>; and Pollock ranks 83<sup>rd</sup>. DeMaria and Maimone also appear on the list and are ranked seventh and 12<sup>th</sup>, respectively. Twenty names were certified on February 14, 2006 from the new list (PM2505G). However, the certification was cancelled on March 7, 2006 due to an error in certification processing. It is noted that the certification was not issued at the request of the appointing authority, rather, the certification was issued when the automated system identified that an employee was serving provisionally as a Police Sergeant. However, upon further review, the employee held permanent status since 1998.

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<sup>1</sup> It is noted that Pollock filed an appeal to the Board regarding his bypass, alleging that he was retaliated against by the former Mayor of Atlantic City. However, in denying his appeal, the Board determined that Pollock did not submit substantive evidence proving his allegation and that the appointing authority had valid reasons to appoint the other eligibles. *See In the Matter of Edward Pollock* (MSB, decided March 9, 2005).

In a letter dated January 12, 2006 from Mayor Robert W. Levy, Sr., to the Assistant Commissioner of Personnel, Mayor Levy confirmed a telephone conference that they had on January 5, 2006 whereby the City of Atlantic City was requesting an extension of the Police Sergeant (PM2547C) eligible list for six months in order to "review whether any vacancies exist to determine whether a Certification of Eligibles will be requested." Mayor Levy indicated that the request was specifically made for the petitioners who were previously not appointed. He also advised that on January 3, 2006, the administration directed that a request for certification be submitted to the Department of Personnel (DOP). However, the request was not made at the time. On January 20, 2006, the Director of the Division of Selection Services, DOP, responded that the Police Sergeant (PM2547C) eligible list could not be extended due primarily to a new list (PM2505G) being issued on January 4, 2006. Further, the Director indicated that there was not sufficient detail or evidence to revive the list on the basis of administrative error. The Director also advised that the extension of a certification beyond the expiration date of an eligible list could only be granted if there were genuine vacancies at the time. Therefore, the Director indicated that there was no compelling reason presented to revive the Police Sergeant (PM2547C) eligible list.

On appeal to the Merit System Board (Board), the petitioners contend that no appointments have been made since the August 15, 2003 certification of the Police Sergeant (PM2547C) eligible list despite the fact that there have been 14 vacancies created by retirement and promotion. They state that former Chief of Police Arthur Snellbaker, Sr., requested that the former Mayor make appointments. However, no appointments were made. On January 1, 2006, Mayor Levy was sworn into office. On January 2, 2006, Acting Chief of Police John Mooney sent a memorandum to Business Administrator Domenic Cappella advising that there were numerous Police Sergeant vacancies and expressing a concern that the prior administration failed to fill the vacancies. Mooney noted that the City Code authorizes 61 Police Sergeants and that there were currently only 46 Police Sergeants. The petitioners also state that on January 3, 2006, the administration of the City of Atlantic City was directed to submit a request for certification to the DOP. However, the petitioners assert that due to administrative error "caused by the overwhelming workload and chaotic and frenzied atmosphere of a new City administration," the request for certification was not made. The petitioners submit a certification from Cappella. Cappella states that he is making the certification in support of the petitioners' appeal for revival and certification of the Police Sergeant (PM2547C) eligible list. Further, he indicates that on January 3, 2006, he was made aware of the existence of 15 Police Sergeant vacancies based on the memorandum from Mooney. Moreover, Cappella advises that it was the intent of the appointing authority to request a certification on January 3, 2006. However, he states that "it was extremely chaotic in the Business Office" on the first day of the new administration and staff failed to contact DOP and forward the documentation

requesting a certification. It is noted that no further response has been provided by the appointing authority with regard to the petitioners' request.

Additionally, the petitioners contend that they were "bypassed" when the appointing authority appointed the number one eligible, Ernesto Del Valle, Jr., from the Police Sergeant, Bilingual in Spanish and English (PM2560F), eligible list, effective September 7, 2005. That eligible list promulgated on January 27, 2005 and expires on January 26, 2008. Del Valle appeared as the 12<sup>th</sup> ranked eligible on the Police Sergeant (PM2547C) eligible list. It is noted that the petitioners have filed a separate appeal to the Board on this issue, which is still pending. The petitioners also filed a civil suit on December 8, 2005 in the Superior Court of New Jersey, alleging racial discrimination and other claims against the City and the former Mayor.<sup>2</sup> On January 10, 2006, a settlement demand was sent to the new City administration requesting that the appointing authority petition the DOP for revival of the expired Police Sergeant (PM2547C) eligible list. In a letter dated January 13, 2006, Kimberly Baldwin, City Solicitor, advised the petitioners that the request had been made. Further, she indicated that "assuming that the decision is favorable and that the list is, in fact, revived . . . I trust that you will dismiss your pending litigation." Thus, the petitioners state that the revival of the expired eligible list is "a key element in the settlement." They note that the lawsuit was filed during the life of the list. Therefore, the petitioners maintain that to correct an administrative error and for good cause, the eligible list for Police Sergeant (PM2547C) should be revived in order for the appointing authority to consider their appointments. *See N.J.A.C. 4A:4-3.4(a).*

PBA Local 24, represented by Curtis Williams, President, submits a statement regarding the petitioners' request. He indicates that there is no dispute that the Atlantic City Police Department is currently understaffed at the rank of Police Sergeant and in need of promotions. However, he asserts that regardless of the appointing authority's intent, no documentation has been produced showing that the appointing authority did in fact request a certification of the Police Sergeant (PM2547C) eligible list prior to its expiration. As such, the eligible list can no longer be used. Further, Williams asserts that to request the extension of the list is contrary to Merit System rules as the list has already been extended. Therefore, he requests that any appointments be made from the current Police Sergeant (PM2505G) eligible list.

In response, the petitioners state that no documentation regarding a request for certification exists as it was not prepared by staff as directed by the administration, which is the basis for the instant appeal. Further, since the new Police Sergeant (PM2505G) eligible list promulgated, there was no longer a need for the documentation to be prepared. Additionally, the petitioners note that a meeting was held where the appointing authority and Williams agreed that the "right and

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<sup>2</sup> It is noted that the petitioners also filed an appeal to the Board regarding the content of the examination for Police Sergeant (PM2505G) and its administration. The matter is still pending.

fair thing to do” was make appointments from the Police Sergeant (PM2547C) eligible list, since it was the intention of the appointing authority to have that list certified. Moreover, the petitioners contend that they are not asking that the Board “bend any rules to suit them” as indicated by Williams. Rather, they request that the prior list be certified as this was the true intent of the appointing authority.

Regarding Maimone and DeMaria, they object to the certification of the Police Sergeant (PM2547C) eligible list and appeal the cancellation of the February 14, 2006 certification of the Police Sergeant (PM2505G) eligible list. They contend that the petitioners’ request and their “de-certification” are related. They state that the request “is a political suit attempting [to] have these six Officers promoted from an expired list.” Maimone and DeMaria state that the life of the list should not be extended beyond four years. Further, they claim that there is no public safety issue to revive the old list as there is a new list that may be certified. They also indicate that the petitioners’ argument that they were “bypassed” because the appointing authority appointed from the bilingual list causes unwarranted appeals. In this regard, Maimone and DeMaria state that if this argument is deemed valid, then all of the Police Officers on the new Police Sergeant (PM2505G) eligible list who are ranked higher than the Police Officers who also rank on the bilingual list could file appeals. This would be a “miscarriage of justice resulting in legal action and drawn out proceedings.” Moreover, Maimone and DeMaria assert that the appointing authority is not credible as it has “changed its story at least twice” in efforts to promote the petitioners. Furthermore, they note that if they are not appointed from the current Police Sergeant (PM2505G) eligible list, they may not have the opportunity for advancement to a higher position, such as Police Lieutenant.

In response, the petitioners object to the consolidation of Maimone and DeMaria’s appeals with their request as they are unrelated. They indicate that the February 14, 2006 certification of the Police Sergeant (PM2505G) eligible list was cancelled due to an error in the automated system and has nothing to do with their request. Further, the petitioners dispute that their request is a “political suit.” They maintain that they filed suit due to the improper and discriminatory motives of the prior Atlantic City administration in failing to make appointments from the then existing list. Thus, the petitioners contend that Maimone and DeMaria’s appeals should be dismissed.

## **CONCLUSION**

The central issues in the petitioners’ case are whether the appointing authority made a timely request for certification of the Police Sergeant (PM2547C) eligible list and whether there were actual vacancies to be filled. Initially, it must be noted that DOP utilizes two dates of significance for eligible lists. The first date, the issue date of the list, represents the date on which the list is initially compiled and provided to the appointing authority for review. The promulgation date, which is typically one week after the issue date, is the date on which the eligible list is

available for certification and appointment. It must be emphasized that, when a list is issued, the appointing authority is not yet able to utilize the list to make appointments. In accordance with the Board's decision in *In the Matter of Promotional Lists for Public Safety Titles*, *supra*, the Police Sergeant (PM2547C) eligible list was extended for "one year . . . or until a new list *becomes available*, whichever occurs first." (Emphasis added). Given that the Police Sergeant (PM2505G) eligible list became available for certification and appointment when it promulgated on January 12, 2006, the Police Sergeant (PM2547C) eligible list expired on January 11, 2006, *not* upon the Police Sergeant (PM2505G) eligible list's issuance. In this regard, an eligible list is not available, within the meaning of the Board's prior decision, when it is issued. Between the issue and promulgation dates, certifications of an eligible list cannot be issued, and appointments cannot be made. Thus, the Police Sergeant (PM2547C) eligible list was available for certification until January 12, 2006. *See e.g., In the Matter of Richard Davis* (MSB, decided June 7, 2006).

However, PBA Local 24 indicates that the appointing authority did not submit appropriate documentation to the Board. In this regard, *N.J.A.C.* 4A:4-4.1(a) states that when a vacancy is to be filled in the competitive division of the career service from an eligible list, the appointing authority shall request a certification of names for regular appointment. Such request shall be submitted in advance under procedures set by the DOP to enable the Department to issue or authorize the necessary certification or advise that there is no appropriate eligible list. The normal procedures for requesting a certification are in writing or electronically through the DOP-maintained Revised Automated Placement System. The request should include relevant information, such as the title of the position or the eligible list to be certified and the number of vacancies. Nevertheless, Mayor Levy contacted the DOP by telephone on January 5, 2006 regarding an extension of the Police Sergeant (PM2547C) eligible list and advised that the administration directed a request for certification be made on January 3, 2006. Cappella also certifies that staff was directed to contact DOP and submit the documentation on January 3, 2006. However, due to administrative error and the timing of events, such a request in writing was never made. Under these particular circumstances, the Board concludes that the appointing authority's failure to submit a timely request in writing should not result in denial of this otherwise meritorious request. It was the intention of the appointing authority to have the DOP issue a certification on January 3, 2006 and Mayor Levy contacted the DOP on January 5, 2006 during the life of the Police Sergeant (PM2547C) eligible list.

Turning to the issue of vacancies, DOP may only issue a certification or extend a certification disposition due date to fill genuine vacancies, *i.e.*, not anticipated vacancies. *See N.J.A.C.* 4A:4-4.1(a), *N.J.A.C.* 4A:4-4.8(b), and *In the Matter of William J. Brennan* (MSB, decided April 9, 2003), *aff'd*, *William J. Brennan v. New Jersey Department of Personnel*, Docket No. A-4412-02T5 (App. Div.

February 24, 2005). In this case, although Mayor Levy requested that the Police Sergeant (PM2547C) eligible list be extended in order to determine “whether vacancies exist[ed],” it is clear from Mooney’s January 2, 2006 memorandum and Cappella’s certification that vacancies did in fact exist. Therefore, based on the timely request for certification as determined above and the fact that vacancies existed, the Board concludes that it is appropriate for the eligible list for Police Sergeant (PM2547C) to be revived and certified. However, as Mayor Levy’s request was made specifically to consider the petitioners, only the names of Pollock, Barnhart, Falcone, Stites, Hendricks, and Cooper will be certified. The Board notes that the petitioners do not possess a vested property interest in employment. The only interest that results from placement on an eligible list is that the candidate will be considered for a vacant position so long as the eligible list remains in force. *See Nunan v. Department of Personnel*, 244 N.J. Super. 494 (App. Div. 1990). There is no indication in the record from the appointing authority that the petitioners will in fact be appointed. Therefore, unless the Board finds that the petitioners’ “bypass” in the matter described above involving the bilingual list was inappropriate, their appointments are not mandated. However, if the petitioners are appointed from the certification, they should be awarded a retroactive date of appointment of January 5, 2006, when Mayor Levy contacted the DOP, which would be the earliest date that the petitioners could have been appointed under the circumstances.

The petitioners argue that the appeal of Maimone and DeMaria is unrelated to their request. However, the Board disagrees. Maimone and DeMaria, eligibles on the current Police Sergeant (PM2505G) list, object to the certification of the Police Sergeant (PM2547C) eligible list. They present, in essence, the opposite side of the petitioners’ argument, and granting their appeal would result in denying the petitioners’ appeal. Therefore, it is appropriate for their appeals to be consolidated with the request of the petitioners. However, the Board has reviewed the arguments of Maimone and DeMaria and finds no basis to their claims. The Police Sergeant (PM2547C) eligible list will be revived and certified based on the foregoing reasons. Further, as to the cancellation of the February 14, 2006 certification of the Police Sergeant (PM2505G) eligible list, it is clear that the cancellation was due to an error in certification processing. The appointing authority did not request that the certification be cancelled. Therefore, there is not a sufficient basis to grant the appeals of Maimone and DeMaria, and they are hereby denied.

## **ORDER**

Therefore, it is ordered that the eligible list for Police Sergeant (PM2547C), City of Atlantic City be revived and the names of Edward Pollock, Jerry Barnhart, Joseph Falcone, Gregory Stites, Lee Hendricks, and Harold Cooper be certified. It is further ordered that, if appointed and upon successful completion of a working test period, the appointed petitioner(s) receive a retroactive date(s) of permanent

appointment of January 5, 2006 for salary step placement and seniority-based purposes only. Additionally, the Board orders that the appeals of Angelo Maimone and Vincent DeMaria be denied.

This is the final administrative determination in these matters. Any further review should be pursued in a judicial forum.